

**IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF INDIANA  
SOUTH BEND DIVISION**

FEDERATED MUTUAL INSURANCE )  
COMPANY as subrogee of BELLMAN )  
OIL CO., INC. and B & B TRANSPORT )  
INC., )  
PO Box 486, Owatonna, MN 55060, )  
Plaintiff, )  
vs. )  
CASE NO.: )  
KOSCIUSKO COUNTY, INDIANA, )  
100 W Center St., Warsaw, IN 46580, )  
And )  
KOSCIUSKO COUNTY HIGHWAY )  
DEPARTMENT, )  
2936 E Old Road 30, Warsaw, IN 46582, )  
And )  
PHEND & BROWN, INC., )  
367 E. 1250 N., PO Box 150, Milford, IN )  
46542, )  
Defendants. )

## COMPLAINT

Now comes Plaintiff, Federated Mutual Insurance Company as subrogee of Bellman Oil Co., Inc. and B & B Transport Inc. (the “Insureds”), by and through undersigned counsel, and for its Complaint states and alleges the following:

## PARTIES

1. Federated Mutual Insurance Company is a Minnesota insurance company with its principal place of business in Owatonna, Minnesota.

2. Kosciusko County is a county located in the State of Indiana and a political subdivision of the State of Indiana as defined by Ind. Code § 34-6-2-110.<sup>1</sup>

3. Kosciusko County Highway Department is the highway department for Kosciusko County located in Indiana.

4. Phend & Brown, Inc. is incorporated in the State of Indiana with its principal place of business in Indiana, located at 367 E. 1250 N., PO Box 150, Milford, IN 46542.

### **JURISDICTION AND VENUE**

5. The Court has subject-matter jurisdiction pursuant to 28 U.S.C. § 1332 because the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between citizens of different states. Complete diversity of citizenship is present as Plaintiff is a citizen of the State of Minnesota and all three (3) Defendants are citizens of the State of Indiana.

6. This Court has personal jurisdiction over the Defendants because each Defendant is domiciled in the State of Indiana.

7. This Court is a proper venue for this action pursuant to 28 U.S.C. § 1391 because all three (3) Defendants reside in Kosciusko County, Indiana, and a substantial part of the events or omissions giving rise to this action occurred in Kosciusko County, Indiana.

### **FACTUAL BACKGROUND**

8. On October 3, 2019 and at all times material herein, Plaintiff was the insurer and subrogee of the Insureds, Bellman Oil Co., Inc. and B & B Transport Inc.

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<sup>1</sup> Pursuant to the Indiana Tort Claim Act, Ind. Code §34-13-3 et seq., Plaintiff sent notice of its claim to counsel for Kosciusko County, Chad Miner, on December 5, 2019. On December 3, 2019, Attorney Miner informed an employee of Plaintiff that all subrogation communication should be sent to him directly, thus the December 5, 2019 notice was sent to Attorney Miner directly as requested within one hundred eighty (180) days after the loss occurred.

9. On October 3, 2019, the Insureds' driver was heading northbound operating a tractor-trailer on County Road 800 West, which is a two-lane highway with no shoulder, about a half mile north of County Road 400 North in Kosciusko County, Indiana.

10. Prior to October 3, 2019, Kosciusko County, Indiana and/or the Kosciusko County Highway Department contracted with Phend & Brown, Inc. to perform construction services on portions of County Road 800 West in Kosciusko County, Indiana, including the area approximately a half mile north of County Road 400 North.

11. At all times relevant herein, the subject roadway was being repaved and was a construction zone with a pavement edge drop-off of approximately 8" to 9" as the shoulder was not yet completed at that time.

12. At all times relevant herein, there were no lane markers, no markings or signs indicating that this area of the highway was under construction or indicating that there was a serious and dangerous pavement edge drop-off, and no traffic barrels.

13. On said date, one or more of the tires on the Insureds' tractor-trailer went off the right edge of the highway, and when Insureds' driver attempted to reenter the highway, the serious and dangerous pavement edge drop-off caused the tractor and trailer to roll approximately four times.

14. Both the tractor and the trailer involved in this incident – a 2003 International 9200 and a 1995 Heil Tank Trailer – were engulfed in flames and were total losses as a result of the incident.

15. Moreover, this resulted in approximately 7800 gallons of spilled ethanol lost for Insureds' customer and required the Plaintiff to hire an environmental cleanup company to clean the spilled ethanol.

16. Federated Mutual Insurance Company, pursuant to the terms and conditions of the applicable insurance policy, upon current information and belief, tendered insurance benefits in an estimated amount of \$224,393.01 to and/or on behalf of its insureds, Bellman Oil Co., Inc. and B & B Transport Inc., related to the October 3, 2019 loss.

17. Federated Mutual Insurance Company, pursuant to the subrogation provision of the applicable insurance policy and in accordance with the common law principles of legal and equitable subrogation, is subrogated to the rights of its Insureds to the extent of the payments made.

**FIRST CAUSE OF ACTION – NEGLIGENCE**

18. Plaintiff incorporates by reference rhetorical paragraphs 1 – 17 as if fully set out herein.

19. At all relevant times herein the Defendants, and each of them, were responsible for construction and/or supervision of construction of the portion of County Road 800 West approximately a half mile north of County Road 400 North in Kosciusko County, Indiana.

20. In the exercise of ordinary care, lane markings and/or signs were required to warn drivers of the construction area and the serious and dangerous pavement edge drop-off, which was created by the Defendants.

21. Defendants, Kosciusko County, Indiana, Kosciusko County Transportation Department, and Phend & Brown, Inc., and each of them, knew or should have known of the serious and dangerous pavement edge drop-off, which caused a dangerous and hazardous condition.

22. Defendants, Kosciusko County, Indiana, Kosciusko County Transportation Department, and Phend & Brown, Inc., and each of them, failed to properly warn the Insureds' driver of the ongoing construction and the serious and dangerous pavement drop-off.

23. At said time and place aforesaid, the Insureds' driver could not reasonably foresee such a serious and dangerous pavement drop-off, including, without limitation, because there were no lane markings, signs, or warnings present.

24. At said time and place aforesaid, Defendants, Kosciusko County, Indiana, Kosciusko County Transportation Department, and Phend & Brown, Inc., and each of them, were guilty of one or more of the following wrongful acts or omissions:

- a. Carelessly, negligently, willfully, wantonly, and with gross negligence failed to exercise reasonable care to keep the highway in a safe condition for drivers.
- b. Carelessly, negligently, willfully, wantonly, and with gross negligence creating a dangerous condition on said highway rendering it unsafe and in a defective condition.
- c. Carelessly, negligently, willfully, wantonly, and with gross negligence permitted a dangerous and hazardous condition to exist on said highway rendering it unsafe and in a defective condition.
- d. Carelessly, negligently, willfully, wantonly, and with gross negligence failed to properly and adequately supervise, monitor, and manage construction of the relevant portions of said highway so as to prevent injury.
- e. Carelessly, negligently, willfully, wantonly, and with gross negligence knew, or should have known, with the exercise of reasonable care, of the dangerous and hazardous condition that existed and failed to respond accordingly.
- f. Carelessly, negligently, willfully, wantonly, and with gross negligence failed to warn the Insureds' driver or other drivers of the dangerous, unsafe and defective conditions of said area.

- g. Carelessly, negligently, willfully, wantonly, and with gross negligence failed to place any warning signs in the area where the incident occurred to warn of the dangerous and hazardous condition which existed.
- h. Carelessly, negligently, willfully, wantonly, and with gross negligence failed to use the care an ordinarily careful county and/or construction contractor would have used under the same or similar circumstances.

25. As a result of the aforementioned negligence of Defendants, Kosciusko County, Indiana, Kosciusko County Transportation Department, and Phend & Brown, Inc., based on current information and belief, Plaintiff's Insureds sustained damages in an estimated amount of \$224,393.01.

WHEREFORE, the Plaintiff, Federated Mutual Insurance Company as subrogee of Bellman Oil Co., Inc. and B & B Transport Inc., prays for judgment against the Defendants, Kosciusko County, Indiana, Kosciusko County Transportation Department, and Phend & Brown, Inc., for these negligent acts and/or omissions in an amount commensurate with the damages incurred by the Plaintiff, prejudgment interest, costs of this action and for all other just and proper relief.

**JURY DEMAND**

The Plaintiff, by and through their undersigned counsel, hereby request a trial by jury on all issues so triable in accordance with Fed. R. Civ. P. 38.

Dated November 13, 2020.

Respectfully submitted,

*/s/ Daniel J. Curtin*

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Danny Merril Newman Jr. (#33668-15)

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